

FILED

December 24, 2018

A17-1423
State of Minnesota
IN SUPREME COURT

OFFICE OF
APPELLATE COURTS

State of Minnesota,

Respondent,

v.

Anthony John Sawina,

Petitioner.

PETITIONER'S PETITION FOR REVIEW

LORI SWANSON
Minnesota State Attorney General
1800 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2134

MICHAEL O. FREEMAN
Hennepin County Attorney

KELLY O'NEILL MOLLER
Assistant County Attorney
C-2000 Government Center
300 South Sixth Street
Minneapolis, MN 55487-0501

BRADFORD COLBERT
Attorney at Law
License No. 166790
875 Summit Avenue, Room 254
St. Paul, MN 55105

(651) 290-6413

ATTORNEYS FOR RESPONDENT

ATTORNEY FOR APPELLANT

A17-1423
State of Minnesota
IN SUPREME COURT

State of Minnesota,

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v.

Anthony John Sawina,

Petitioner.

TO: The Supreme Court of the State of Minnesota

Petitioner respectfully requests that the Minnesota Supreme Court review the decision of the court of appeals entered on December 10, 2018.

I. PARTIES

The parties and their attorneys are set forth on the cover.

II. DECISION APPEALED

Mr. Anthony Sawina seeks review of the unpublished decision of the court of appeals filed on December 10, 2018. *State v. Sawina*, A17-1423 (Minn. Ct. App. December 10, 2018), attached in addendum. On his appeal, Sawina asked the Court of Appeals to reverse his convictions for attempted first degree murder because: (1) the evidence was insufficient as a matter of law to prove intent or premeditation; and (2) the

district court erred in instructing the jury on the doctrine of transferred intent. In the alternative, Sawina asked the Court of Appeals to modify his sentence because the imposed sentence, which was 14 years longer than requested by the State, exaggerated the criminality of his conduct. The Court of Appeals affirmed Mr. Sawina's convictions and sentence. Judge Tracy Smith wrote the opinion for the court; Judges Johnson and Larkin were also on the panel that decided this case.

III. LEGAL ISSUE

The doctrine of transferred intent in homicide cases permits a defendant to be convicted of murder where the harm occurs to someone other than the intended victim. But the doctrine of transferred intent becomes more controversial and much more complicated where the crime at issue is an attempted murder because the harm in an attempted murder actually occurs to the intended victim. In many cases, including this one, applying the doctrine of transferred intent exaggerates the criminality of the defendant's conduct. As a result, many courts have held that the doctrine of transferred intent should not apply to attempted homicides.

Should the doctrine of transferred intent apply to attempted homicide?

The district court held that the doctrine of transferred intent should be applied to homicides and instructed the jury on transferred intent.

The Court of Appeals affirmed the district court.

IV. PROCEDURAL HISTORY

1. June 29, 2016: Date of alleged offense.
2. July 22, 2016: The State charged Anthony Sawina with five counts of second-degree assault, Minn. Stat. § 609.222, subd. 1.
3. April 20, 2017: The State amended its complaint and charged Sawina with two counts of attempted first-degree premeditated murder, Minn. Stat § 609.185(a)(1), two counts of attempted second-degree intentional murder, Minn. Stat. § 609.19, subd. 1, and with five counts of second-degree assault, Minn. Stat. § 609.222, subd. 1.
4. May 1 – 11, 2017: Jury trial in Hennepin County District Court before the Honorable Kathryn L. Quaintance.
5. May 11, 2017: Sawina convicted of all nine counts.
6. June 12, 2017: Judge Quaintance sentenced Sawina to 39 years in prison.
7. September 11, 2017: Sawina filed notice of appeal.
8. December 10, 2018: The Court of Appeals affirmed Sawina's convictions and sentences.

V. STATEMENT OF FACTS

Petitioner Anthony John Sawina's convictions arose from a shooting that occurred at bar time on June 29, 2016, in Minneapolis, Minnesota.¹ Sawina and his friend Jacob Johnson left the Library Bar at around 2:00 a.m. They were working down the street with a big group of people that they had met at the bar. The group encountered five men, all practicing Muslims observing Ramadan and attired in qamis. Someone in Sawina's group made a derogatory remark about Muslims.

The Muslim men got into their car. As they began to drive off, the driver pointed out Sawina and his friend Johnson, saying they were with the group that made the offensive comment about Muslims. The driver stopped the car and asked Sawina and Johnson about the comment.

The discussion escalated into a confrontation. According to some witnesses, Sawina pulled out his gun, said that he had a right to carry a gun and that he was going to kill the men in the car. The frontseat passenger got out of the car and ran away. Sawina moved to the front of the car and pointed his gun at another passenger; Sawina then moved back along the right side of car, told the right-backseat passenger, who had opened the right rear door and was getting out, to get back in the car, and pointed the gun at him. The passengers told the driver to take off, but the driver had trouble getting the car in gear; when the car started moving, the left-backseat passenger opened his door and ran away.

¹ A more complete version of the Statement of Facts is included in Petitioner's (Appellant's) Brief to the Minnesota Court of Appeals, which is included as part of the addendum.

Sawina fired two bullets through the open right rear door. Two of the passengers received bullet wounds in their legs. The injuries were not serious.

Sawina admitted that he shot into the car, but testified that he shot in the car to defend himself. Sawina said that he did not intend to hurt anyone; he shot into the car because he feared for his safety and believed that he could be shot.

The State originally charged Sawina with five counts of second-degree assault and offered Sawina a plea agreement wherein, if Sawina agreed to plead guilty to all five counts of second degree assault, he would receive a sentence of fifteen years in prison. After Sawina declined this offer, the State amended its complaint and added two counts of attempted first-degree premeditated murder and two counts of attempted second-degree intentional murder (for the persons who had been hit by the bullets).

The case was tried to a jury in Hennepin County District Court. During jury deliberations, the jury asked what they should do if they determined that Sawina did not intend to kill the two persons he was charged with attempting to kill, but actually intended to kill another person, presumably the driver. In response, the trial court, over Sawina's objection, instructed the jury on transferred intent. The jury convicted Sawina of all nine counts.

At sentencing, the State asked that Sawina be sentenced to 25 and ½ years in probation. Sawina requested a sentence of 6 years. The district court sentenced Sawina to 39 years in prison.

Sawina appealed his conviction and sentence to the Minnesota Court of Appeals. On December 10, 2018, the Court of Appeals affirmed his conviction and sentence.

VI. REASONS FOR GRANTING REVIEW

This case provides the Minnesota Supreme Court with the opportunity to decide an incredibly important question regarding transferred intent and attempted murder, a controversial and complicated legal topic that has vexed courts and commentators for years. Specifically, this case presents the issue of whether the doctrine of transferred intent can be used where the defendant was convicted of two counts of attempted first degree murder where the jury concluded that Sawina did not intend to kill either person, but rather a completely different person. This case also presents the somewhat related issue regarding sentencing – when does a “permissible” sentence exaggerate the criminality of a defendant’s questions.

The Court should accept review because: (1) the question presented is an important one upon which the Supreme Court should rule; (2) a decision by the Supreme Court will help develop, clarify, or harmonize the law; and the resolution of the question presented has possible statewide impact and will likely recur unless resolved by the Supreme Court; and (3) the Minnesota Court of Appeals has issued conflicting decisions on the question. Minn. R. Crim. P. 29.04, subd. 4.

A. Overview of Transferred Intent: Basic Operation and Rationales

The doctrine of transferred intent has been around since the sixteenth century. “Although there is ‘no canonical statement’ of the rule, it can be generally described as imposing liability on an actor who intends to kill or injure one person, but accidentally kills or injures a different, unintended victim. Nancy Ehrenreich, *Attempt, Merger, and*

Transferred Intent, 82 Brook. L. Rev. 49, 55 (2016). *See also*. *State v. Hall*, 722 N.W.2d 472, 477 (Minn. 2006) (transferred intent is the principle that a defendant may be convicted where the accused intends to kill one person, but instead kills someone else, *quoting* McCarr & Nordby, *Minnesota Practice* § 44.8 (3d ed. 2001)). The underlying public policy goal of transferred intent “is to hold the actor culpable for his intended actions.” *Id.*

In Minnesota, transferred intent is included in the homicide statutes: A person who “causes the death of a human being with premeditation and with intent to effect the death of the person or of another” is guilty of first-degree murder. Minn. Stat. § 609.185, subd. a(1). The “or another” phrase incorporates the doctrine of transferred intent. *See State v. Sutherlin*, 396 N.W.2d 238, 240 (Minn. 1986) (explaining that language of Minn. Stat. § 609.185 incorporates the doctrine of transferred intent).

The principle of transferred intent is not controversial in the “classic” application of the transferred intent doctrine; that is, when a person, other than the defendant's intended victim, suffers the actual harm intended for intended victim. The reasoning behind the doctrine is that an actor should receive the same punishment he would have received had he successfully completed the crime he intended to commit; this reasoning turns on the relationship between the actor's intent and the result actually caused. Ehrenreich, *Attempt, Merger, and Transferred Intent*, at 63. “[T]ransferred intent makes a whole crime out of two halves by joining the intent as to one victim with the harm caused to another victim.” *Ford v. State*, 330 Md. 682, 712, 625 A.2d 984, 998 (1993).

B. Transferred Intent and Attempted Homicides

But Sawina was not convicted of killing anyone; instead, he was charged and convicted of two attempted murders, although the jury determined that he actually intended to kill a completely different person. Unlike a completed crime like, an attempted homicide has no harm element; therefore, there is no need to link the intent as to one victim with the harm of another – the intent as to the intended victim suffices for liability. In an attempted crime, the actual harm – the attempt to commit the crime – actually occurs to the intended victim.

Because of this, many courts and commentators have determined that the doctrine of transferred intent should not be applied to attempted murder.

For example, in *People v. Bland*, the California Supreme Court discussed the concept of transferred intent as applied to attempted murder charges. 28 Cal. 4th 313, 328, 48 P.3d 1107, 1117 (2002). The California Supreme Court recognized that the ““business of ‘transferring’ the *mens rea* of a specific intent to kill from an intended victim to an unintended victim (or, more properly, simply applying it to the unintended victim) becomes far more complex when dealing with inchoate criminal homicides such as attempted murder.” *Bland*, 48 P.3d at 1116.

The Court concluded that the rationale for transferring intent for completed homicides “does not apply to persons not killed. We see no suggestion the Legislature intended to extend liability for unintended victims to an inchoate crime like attempted murder. The crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences.” *Bland*, 48 P.3d at 1116-17.

We should also distinguish between a completed murder and attempted murder regarding transferred intent. Someone who in truth does not intend to kill a person is not guilty of that person's attempted murder even if the crime would have been murder—due to transferred intent—if the person were killed. To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others.

People v. Bland, 48 P.3d at 1117. *See also, Ford v. State*, 330 Md. 682, 712, 625 A.2d 984, 998 (1993) (the court categorically stated, albeit in dicta, that transferred intent could not be used to obtain multiple convictions of the same intent-based offense when the crime was completed as to the intended victim).

Other courts have reached the opposite conclusion. *See, e.g., State v. Gillette*, 699 P.2d 626 (N.M. Ct. App. 1985) (the court allowed transferred intent to be used to convict the defendant of attempted murder of not only the intended victim but also the unintended victims, without direct proof of any culpability towards those victims).

C. Transferred Intent and Attempted Homicides in Minnesota

This Court has not explicitly addressed the complications involved in applying transferred intent to attempted homicides, although it has affirmed convictions for attempted murder using the doctrine of transferred intent. *See State v. Ford*, 539 N.W.2d 214, 217 (Minn. 1995) (the supreme court upheld the defendant's convictions for first-degree murder and attempted first-degree murder for killing a police officer and wounding a bystander, saying that the attempted murder conviction involved "the doctrine of transferred intent").

The Minnesota Court of Appeals has come to different conclusions on this issue. In *State v. Noble*, 669 N.W.2d 915, 917–18 (Minn. Ct. App. 2003), *pet. for rev. denied* (Minn. Dec. 23, 2003), this Court of Appeals noted that it “is questionable whether the doctrine of transferred intent applies to attempted murder.”

In a published decision, *State v. Bakdash*, 830 N.W.2d 906, 914 (Minn. Ct. App. 2013), *pet. for rev. denied* (Aug. 6, 2013), the Court of Appeals upheld a defendant’s convictions for attempted second degree murder based on a theory of transferred intent. *See also State v. Glass*, No. A14-2003, (Minn. App. Dec. 21, 2015) (holding that where there was no murder but only attempted murder, the intent to attempt murder of a specific individual could transfer to another victim injured in the attempt).

D. Transferred Intent and Attempted Homicides in this Case.

This case is the perfect vehicle for addressing this important issue for several reasons.

First, the trial court, over the defendant’s objection, specifically instructed the jury on transferred intent. The issue arose because the State charged Sawina with the attempted premeditated murder of the two passengers who were hit by bullets.

But the State never really argued that Sawina intended to kill either one of the passengers. During deliberations, the jury asked if they determined that Sawina did not intend to kill the two persons he was charged with attempting to kill, but another person, presumably the driver, could they still convict him on both counts of attempted murder. In response, the trial court, over Sawina’s objection, instructed the jury on transferred intent.

Second, this case illustrates how the application of transferred intent to attempted homicides makes two crimes out of one. The jury concluded that Sawina intended to kill one person (the driver out of the car) not the two people, the passengers of the car, that he was charged with killing. But by applying the doctrine of transferred intent in this case, the State made two crimes (the attempted murders of the passengers, which the jury concluded he did not intend) out of one (the attempted murder of the driver, which the jury concluded he did intend).

This is not commiserate with Sawina's culpability. If he intended to kill one person, then he should be convicted of the attempted killing of that one person, not the attempted intentional killing of two people that he did not intend to kill.

Third, and finally, the application of the transferred intent doctrine also significantly impacted Sawina's sentence. One of the problems in applying the doctrine of transferred attempt to attempted murders is that there is no rational way to limit the applicability of the doctrine. As the California Supreme Court noted in *People v. Bland*, in an attempted murder scenario where the defendant fires a shot at an intended victim and hits someone else— as was alleged here — “it is virtually impossible to decide to whom the defendant's intent should be transferred. Is the intent to murder transferred to everyone in proximity to the path of the bullet? Is the intent transferred to everyone frightened and thereby assaulted by the shot? There is no rational method for deciding how the defendant's intent to murder should be transferred.” 28 Cal. 4th at 328, 48 P.3d at 1117.

In this case, the State originally charged Sawina with five counts of second-degree

assault and offered Sawina a plea wherein he would be convicted of five counts of second degree assault and serve fifteen years in prison. When he refused to accept their plea offer, they added two counts of attempted first-degree murder. But there was no reason to limit the charges to two counts of attempted first-degree murder; the State could have charged Sawina with five counts of attempted first degree murder.

Sawina was eventually convicted of two counts of attempted first degree murder and three counts of second degree assault; he was sentenced to 39 years in prison. The district court in this case imposed multiple consecutive sentences on convictions for different offenses involving different victims.

The law permits consecutive sentences for crimes against different persons, with the only limitation being that “the multiple sentences must not unfairly exaggerate the criminality of the defendant's conduct.” *State v. Smith*, 541 N.W.2d 584, 590 (Minn.1996). This is a difficult standard to apply in the best of cases, but it becomes even more difficult when the doctrine of transferred attempt is applied to attempted murders.

The purpose of the Sentencing Guidelines is to establish rational and consistent sentencing standards. Minn. Sentencing Guidelines, 1.A. Because there is no rational method to limit the applicability of the transferred intent doctrine in attempted murder cases, there is also no rational limit to the sentences that can be imposed. The result is irrational and inconsistent sentences – as illustrated by this case.

CONCLUSION

The doctrine of transferred intent in homicide cases permits a defendant to be convicted of murder where the harm occurs to someone other than the intended victim. But the doctrine of transferred intent becomes more controversial and much more complicated where the crime at issue is an attempted murder because the harm in an attempted murder, actually occurs to the intended victim. As a result, many courts have held that the doctrine of transferred intent should not apply to attempted homicides. And this is not just an academic exercise because applying the doctrine of transferred intent to attempted homicides could result in the exaggeration of the criminality of a defendant's conduct.

This Court has not explicitly addressed the complications involved in applying transferred intent to attempted homicides, although it has affirmed convictions for attempted murder using the doctrine of transferred intent, and the Minnesota Court of Appeals has come to different conclusions on this issue.

The Minnesota Supreme Court should accept review to decide this important question.

Dated: December 24, 2018

Respectfully submitted,

LEGAL ASSISTANCE TO
MINNESOTA PRISONERS

/s/ Bradford Colbert

Bradford Colbert
Attorney at Law, License No. 166790
875 Summit Avenue, Room 254
St. Paul, MN 55105
(651) 290-6413
ATTORNEY FOR PETITIONER

A17-1423

STATE OF MINNESOTA

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CERTIFICATE OF WORD COUNT

Anthony John Sawina,

Petitioner.

Bradford Colbert, the attorney for Petitioner, certifies the following:

According to the word count of the word processing software, there are 3,105 words in this petition for review.

Dated: December 24, 2018

Respectfully submitted,

/s/ Bradford Colbert

Bradford Colbert

License No. 166790

875 Summit Avenue, Room 254

St. Paul, MN 55105

(651) 290-6413

ATTORNEY FOR PETITIONER